

Appeal from decision of California State Office, Bureau of Land Management, denying protest to issuance of oil and gas lease CA 9656 with stipulations.

Vacated and remanded.

1. Notice: Generally -- Oil Gas Leases: Noncompetitive Leases -- Oil and Gas Leases: Stipulations

Where a noncompetitive over-the-counter oil and gas lease is issued without notice to the offeror of additional stipulations, the lease is not binding on the offeror, and it is without effect in the absence of the offeror's consent to the additional stipulations. However, the offeror's consent to the additional stipulations will be assumed, and the lease presumed to be validly issued, unless the offeror objects to the stipulations within 30 days of their receipt. Any deficiency in the notice procedure for the stipulations is cured when the offeror fails to object timely to imposition of the new stipulations.

APPEARANCES: Harry K. Veal, pro se.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

Harry K. Veal appeals from a decision of the California State Office, Bureau of Land Management (BLM), dated July 21, 1982, denying his protest to issuance of oil and gas lease CA 9656 containing stipulations.

Appellant's over-the-counter noncompetitive oil and gas lease offer was filed on April 22, 1981, for lands situated in San Bernardino County, California, pursuant to section 17 of the Mineral Leasing Act, as amended, 30 U.S.C. § 226 (1976). On April 26, 1982, BLM signed the lease offer, thereby issuing the lease, effective May 1, 1982, "subject to the provisions of the offer and on the reverse side hereof [lease terms]."

BLM attached to the lease "Oil and Gas Lease -- Surface Occupancy Stipulations," a "Wilderness Protection Stipulation," and an "Advisory Note" relating to the fact that part or all of the lands in the lease may be suitable habitat for the desert tortoise. On April 27, 1982, appellant filed an application for the withdrawal of his offer. By decision issued May 21, 1982, BLM denied the requested withdrawal because the lease had been issued. 1/

In a document dated June 25, 1981, appellant stated he was filing a notice of appeal from the decision of the California State Office issuing lease CA 9656 on April 26, 1982, incorporating additional terms set out in the attached stipulations without granting to the lessee the right to reject or appeal the issuance of the lease including the additional terms. In its decision of July 21, 1982, BLM treated this appeal as a protest to the issuance of the lease with the stipulations. BLM stated:

In reviewing the merits of the protest, the first observation is the lessee did not object to the stipulations when the lease was first issued. If the issuance of the lease is to be considered an adverse decision, the protest if it were considered an appeal is not timely filed (within thirty days of the adverse decision). Thus, it appears the lessee is not objecting to the stipulations but is trying to perfect his withdrawal of the offer through the appeal procedures.

This office considered the issuance of the lease a favorable action. The stipulations are standard stipulations used on all leases issued by this office. The stipulations are made part of the leases without acknowledgment (signature) of the lessees. \* Because this procedure was questioned, verification of the correct procedure was sought from the Bureau headquarters office. It verified the standard stipulations did not require the lessees signature.

In view of the foregoing, it is determined that the standard stipulations were properly made part of lease CA 9656, and, therefore, the protest is denied.

\* This office has issued thousands of leases in this manner.

On appeal appellant states that the following words were stamped on the front of the issued lease: "Surface Disturbance Stipulations are attached to and made part of this lease." Appellant asserts that he has been adversely affected in two ways by BLM's decision to issue the lease subject to certain stipulations; first, he was required to accept a lease containing different terms from those on which the offer was based and without an opportunity to consent, object, or refuse the additional terms and, second, the stipulations imposed by BLM are unduly restrictive.

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1/ Under 43 CFR 3110.1-4,

"An offer may not be withdrawn, either in whole or in part unless the withdrawal is received by the proper office before the lease, an amendment of the lease, or a separate lease whichever covers the land described in the withdrawal, has been signed on behalf of the United States."

Appellant says that he was not on notice of the stipulations from the lease offer; that the lease offer provides only that BLM may require special stipulations which are necessary for the protection of lands embraced in the lease; that the lease offer does not authorize BLM to require the offeror to accept a lease subject to whatever stipulations may be imposed.

Appellant objects particularly to the uncertainty created by the stipulations as to what rights, if any, the lessee obtains with the lease. Appellant points out that the stipulation for the protection of endangered species may disallow surface occupancy. 2/ He refers to the "Advisory Note" attached to the lease which deals with the protection of the Desert Tortoise. 3/ He asserts that by the terms of this notice BLM may restrict surface occupancy and may also provide for possible seasonal restrictions. Appellant states that the Wilderness Protection Stipulation provides for restrictions which may also include no occupancy of the surface. 4/

Appellant acknowledges that standard stipulations are included in the Surface Disturbance Stipulations, but notes that the imposition of

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2/ Section 9 of the Surface Disturbance Stipulations provides in part: "The leased lands may be in an area suitable for the habitat of threatened or endangered plant and animal species. \* \* \* This process may result in some restrictions to the lessee's plan of development, or even disallow surface disturbance."

3/ "ADVISORY NOTE: Part or all of the lands included in the lease may be suitable habitat for Desert Tortoise. The District Manager, Bureau of Land Management, may restrict or disallow surface use or occupancy in critical areas. These areas will be identified at the APD stage. The District Manager may disallow exploration or development activities during the tortoise's breeding season which occurs from March 1, to June 15, of each year in these areas."

4/ The Wilderness Protection Stipulation reads in part:

"Until the BLM determines that the lands covered by this lease do not meet the criteria for a wilderness study area as set forth in section 603, or until Congress decides against the designation of lands included within this lease as 'wilderness,' the following conditions apply to this lease, and override every other provision of this lease which could be considered as inconsistent with them and which deal with operations and rights of the lessee:

"1. Any oil or gas activity conducted on the leasehold for which a surface use plan is not required under NTL-6 (for example; geophysical and seismic operations) may be conducted only after the lessee first secures the consent of the BLM. Such consent shall be given if BLM determines that the impact caused by the activity will not impair the area's wilderness characteristics.

"2. Any oil and gas exploratory or development activity conducted on the leasehold which is included within a surface use plan under NTL-6 is subject to regulation (which may include no occupancy of the surface) or, if necessary, disapproval until the final determination is made by Congress to either designate the area as wilderness or remove the section 603 restrictions."

restrictive stipulations that could possibly disallow surface use or occupancy during a portion of or during the entire year are certainly not standard.

Appellant requests the Board to remand the lease to BLM to revoke the issuance of the lease and reconsider the stipulations. After BLM has reviewed and/or revised the stipulations, appellant requests that he be provided time to review the stipulations and either consent to them, appeal them to the Board, or decline to accept the lease subject to the stipulations.

[1] In Emery Energy, Inc. (On Reconsideration), 67 IBLA 260 (1982), the Board held that where a noncompetitive over-the-counter oil and gas lease is issued without notice to the offeror of an additional stipulation, the lease is not binding on the offeror, and it is without effect in the absence of the offeror's consent to the additional stipulation. However, the offeror's consent to the additional stipulation will be assumed, and the lease presumed to be validly issued, unless the offeror objects to the stipulation within 30 days of its receipt. Any deficiency in the notice procedure for the stipulation is cured when the offeror fails to object timely to imposition of the new stipulation. In its decision issued to appellant, BLM states that appellant did not object to the stipulations when the lease was first issued. BLM issued the lease on April 26, 1982, and appellant filed his application for withdrawal of his offer on April 27, 1982. We construe the application for withdrawal as a protest to the issuance of the lease with the stipulations. Since the application for withdrawal was filed the day after the issuance of the lease, the 30-day time requirement in Emery Energy, Inc. (On Reconsideration), supra, has been satisfied.

In Emery Energy, Inc., 64 IBLA 285, aff'd on reconsideration, 67 IBLA 260 (1982), the Board held that an oil and gas lease offeror could not be bound by leases containing terms of which the offeror did not have either constructive notice or actual knowledge before the issuance of the leases, in the absence of the offeror's consent to those terms. Accord, Robert P. Schafer, 71 IBLA 191 (1983); Security Resources Corp., 70 IBLA 319 (1983). The Board has noted that this decision is based on the legal principle that requiring additional terms in the form of stipulations without prior notice to the offeror constitutes a counter offer. Robert P. Schafer, supra at 192; Emery Energy, Inc. (On Reconsideration), supra at 264. 5/

The provisions of 43 CFR Subpart 3109 afford a noncompetitive lease offeror constructive notice that the offeror may be required to consent to various stipulations in obtaining an oil and gas lease, and on the face of BLM's noncompetitive lease instruments there is a specific reference to 43 CFR

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5/ We note that on Feb. 4, 1983, the Deputy Director of Energy and Mineral Resources, BLM, issued Instruction Memorandum No. 83-298 to the BLM state directors and mineral managers, informing them of a lessee's option to refuse a lease and receive a refund of advanced rental fees, in accordance with the Board's Emery Energy decision, when BLM issues a lease containing stipulations to which the lessee did not consent and the lessee protests the lease within 30 days of its issuance.

3103.2 in Item 5(c). 6/ Also, the "Special Instructions" on the back of the lease instrument contain a description of the types of stipulations that may be added to the lease upon issuance, in accordance with 43 CFR 3103.2. These instructions further inform the offeror that "[w]henever other stipulations are necessary, lessee will be required to agree to them before the issuance of lease." 7/ (Emphasis added.)

We note that the cultural resources stipulation requires the lessee, prior to undertaking any surface disturbing activities on the lands covered by this lease, to engage the services of a qualified resource specialist possessing a valid Antiquities Act permit for the area, to conduct a cultural resource inventory of the areas to be impacted, including the access route, unless notified to the contrary by the District Oil and Gas Supervisor. The lessee is required to submit a certified report to the BLM District Manager and the Supervisor containing all the information required in the Antiquities Act permit. The stipulation further provides that all costs of the survey and salvage of cultural resource values will be borne by the lessee. BLM also added stipulations limiting surface disturbance in the vicinity of an identified road and prohibiting occupancy and other surface disturbances on slopes in excess of 50 percent without written permission from the Supervisor, with the concurrence of the District Manager. Another stipulation potentially further limited surface disturbance on the basis of future environmental analyses related to such factors as endangered species which might be found to exist in the area.

Neither the requirement of an antiquities survey nor the surface disturbance stipulations appear to be within the scope of the stipulations described in 43 CFR Subpart 3109 and the lease offer tendered by appellant; therefore, appellant did not have constructive notice of these lease terms at the time he submitted his lease offer. Robert P. Schafer, supra at 193. Further, there is no evidence in the record that appellant was actually notified of the additional lease terms prior to BLM's issuance of the lease. We conclude, under these circumstances, that appellant did not consent to the additional lease terms and, therefore, cannot be bound by the lease as issued. Accordingly, we hold that the lease is without effect, in the absence of his

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6/ The reference in the lease to 43 CFR 3103.2 is outdated. The provisions of that regulation are now set forth at 43 CFR 3109.4-2.

7/ The full instructions regarding stipulations in the lease are as follows:

"Whenever applicable the stipulations referred to will be made a part of this lease and will be furnished the lessee with the lease when issued. The forms covering them with a brief description are as follows: 3103-2 Stipulations for lands where the surface control is under the jurisdiction of the Department of Agriculture; 3103-1 Lands potentially irrigable, lands within the flow limits of a reservoir site, lands within the drainage area of a constructed reservoir; 3500-1 Lands withdrawn for power purposes; and 3120-3 Wildlife Refuge, Game Range, and Coordination Lands. Whenever other stipulations are necessary, lessee will be required to agree to them before the issuance of the lease." (Emphasis added.)

consent to the additional stipulations, and we hereby vacate oil and gas lease CA 9656. 8/

BLM must submit the proposed stipulations to appellant-offeror for acceptance prior to reissuance of the lease. The language in the present stipulations should be clarified, so that the lessee may be assured of the limits of his application to the leased lands at any future date. Full justification for the need to impose the stipulations must be given to the appellant-offeror prior to imposition of the stipulations on the lease. In its decision requiring the acceptance of the stipulations, appellant-offeror must be given the right of appeal. If at that time, appellant-offeror declines to accept the lease with the stipulations, and does not appeal, refund of the advance rental must be made.

Regarding the Wilderness Protection Stipulation, we note that BLM does not specify what lands, if any, are included in Wilderness Study Areas (WSA) Consistent with Instruction Memorandum No. 83-237, to the extent the lease offer embraces land in a WSA, it must be held in suspense "until Congressional action is taken on the President's recommendation." See Ida Lee Anderson, 70 IBLA 259, 263 (1983).

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case is remanded to BLM for further action consistent herewith.

Anne Poindexter Lewis  
Administrative Judge

We concur:

Edward W. Stuebing  
Administrative Judge

Gail M. Frazier  
Administrative Judge

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8/ On Apr. 25, 1983, the Board received a letter from appellant in which he stated that he was awaiting the Board's decision before submitting the 1983 rental payment. Although BLM has made no determination on this matter which is before us on appeal, failure to pay the rental necessarily raises certain implications which cannot be ignored.

